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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AO-370-A9; 11-0093; AMS-FV-10-0087; FV10-930-5]

**Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin;
Order Amending Marketing Order No. 930**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends Marketing Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. These amendments were proposed by the Cherry Industry Administrative Board (CIAB), which is responsible for local administration of the order. These amendments revise: the definition of "Handle"; and regulations concerning "Marketing Policy" and "Grower Diversion Privilege." The amendments are intended to improve the operation and administration of the order.

DATES: This rule is effective [INSERT 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: Prior documents in this
proceeding: Notice of Hearing issued on March 4, 2011, and
published in the March 14, 2011, issue of the **Federal**
Register (76 FR 13528). The Recommended Decision was
issued on November 3, 2011, and published in the November
9, 2011, issue of the **Federal Register** (76 FR 69673), and a
Secretary's Decision and Referendum Order issued on
February 28, 2012, and published in the March 5, 2012 issue
of the **Federal Register** (77 FR 13015).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

This final rule was formulated on the record of a public hearing held April 20 and 21, 2011, in Grand Rapids, Michigan, and a second public hearing held April 26, 2011, in Provo, Utah. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act", and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR Part 900). Notice of this hearing was published in the **Federal Register** on March 14, 2011 (76 FR 13528). The notice of hearing contained the proposal submitted by CIAB and one proposal by the Agricultural Marketing Service (AMS).

Upon the basis of evidence introduced at the hearings and the record thereof, the Administrator of AMS issued a Recommended Decision published in the **Federal Register** on November 9, 2011 (76 FR 69673). An opportunity to file written exceptions was provided through November 25, 2011.

Two comments were received during that period in support of these amendments.

A Secretary's Decision and Referendum Order was issued on February 28, 2012, and published in the March 5, 2012, issue of the **Federal Register** (77 FR 13015). This document directed that a referendum among tart cherry growers and processors be conducted during the period March 19, 2012, through March 30, 2012, to determine whether they favor the proposed amendments to the order. To become effective, the amendments had to be approved by at least two-thirds of the growers voting in the referendum or two thirds of the production represented by such growers. In addition, processors who had frozen or canned at least fifty percent of the volume of tart cherries had to vote in favor of the amendments for them to become effective. All of the proposed amendments were approved by growers and processors. The amendments included in this final order will:

1. Amendment 1 revises the term "handle" within the order. This amendment revises existing section 930.10, Handle, to exclude handler acquisition of grower diversion certificates from the definition of handle.

2. Amendment 2 revises the "marketing policy" provisions in section 930.50 of the order so that grower-

diverted cherries are not counted as production in the volume control formula.

3. Amendment 3 revises the existing section 930.58, so grower-diverted cherries are not treated as actual harvested cherries.

In addition to the proposed amendments to the order, AMS proposed to make any additional changes to the order as may be necessary to conform to any amendment that may result from the hearings.

A marketing agreement was subsequently mailed to all tart cherry handlers in the production area for their approval. The marketing agreement was approved by handlers representing more than 50 percent of the volume of tart cherries handled by all handlers during the representative period of July 1, 2010, to June 30, 2011.

Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately

burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

There are approximately 40 handlers of tart cherries subject to regulation under the order and approximately 600 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. A majority of the tart cherry producers and handlers are considered small entities under the SBA standards.

The geographic region regulated by the order includes the states of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Acreage devoted to tart cherry production in the regulated area has declined in recent years. According to data presented at the hearings, bearing acreage in 1987-88 totaled 50,050 acres; by 2010-11 it had declined to 35,650 acres. Michigan accounts for 73 percent of total U.S. bearing acreage with 26,200 bearing acres. Utah is second, with a reported 3,300 acres, or approximately nine percent of the total. The remaining

states' acreage ranges from 600 to 1,800 acres. The order includes authority for (1) volume regulation, (2) promotion and research, and (3) grade and quality standards. Volume regulation is used under the order to augment supplies during low supply years, with product placed in reserves during large supply years.

Production of tart cherries can fluctuate widely from year to year. The magnitude of these fluctuations is one of the most pronounced for any agricultural commodity in the United States, and is due in large part to weather related conditions during the bloom and growing seasons. This fluctuation in supply presents a marketing challenge for the tart cherry industry because demand for the product is relatively inelastic, meaning a change in supply has a proportionately larger change in price.

According to data presented at the hearing, production has ranged from a low of 62.5 million pounds in 2002-03 to a high of 395.6 million pounds in 1995-96. For 2010-11, Michigan accounted for 71 percent of total U.S. production with 135 million pounds. Utah is second, with a reported 23 million pounds, or approximately twelve percent of the total. The remaining states produce between 15.4 and 1.2 million pounds.

During the hearings, multiple witnesses testified that they did not believe that these amendments will have any adverse impacts on small agricultural service firms or small agricultural producers as defined by the SBA. According to the record, these amendments will help agricultural businesses and growers by encouraging growers to divert some of their tart cherries in the orchard during years of extremely large supply and result in higher grower returns during years of extremely large supply. Furthermore, the growers who divert their crop do not incur harvest and transportation costs. These amendments will result in a lower possibility of market saturation. Overall the supply of tart cherries in extremely large supply years results in higher returns for growers.

These amendments provide additional flexibility in administering the volume control provisions of the order, and improve its operation and administration. Record evidence indicates that these amendments benefit all producers and handlers under the order, regardless of size.

The amendments in this final order are: Amendment 1 revises Section 930.10 of the order to change the definition of "handle," so that handler acquisition of grower diversion certificates is not considered handling. Amendment 2 revises the "marketing policy" provisions in

Section 930.50 of the order so that grower-diverted cherries are not counted as production in the OSF. Amendment 3 revises section 930.58 of the order so that grower-diverted cherries are not treated as actual harvested cherries. These amendments modify how grower diversions are accounted for under the order.

Evidence presented when the order was promulgated indicated that a grower diversion program benefits the industry by managing fluctuating supply. Witnesses indicated that the order has been successful in this regard. However, the record indicated that the order should be more flexible in addressing how grower diversions are utilized under the order.

The most efficient method to deal with a surplus is at the lowest level of the production and processing chain. The industry wastes the least amount of resources if it diverts cherries in the orchard. Once they are harvested, chilled, washed, de-stemmed, sorted, pitted, and packed, significantly higher costs are incurred and there is a greater risk of waste. Diverting surplus cherries in the orchard is the most cost effective method of dealing with a surplus situation and provides the largest benefit to growers through lower costs.

The order establishes an opportunity for growers to undertake in-orchard diversions of cherries (section 930.58). These diversions are done during harvest in accordance with procedures defined under the order and are overseen by the CIAB. The CIAB issues grower diversion certificates to the growers that represent the pounds of cherries that were left in the orchard.

Growers redeem the diversion certificates with handlers, who use them as one of their compliance alternatives to meet their reserve or restricted obligation. However, under the previous order definition of "handle," handlers must include the pounds of cherries represented by the certificates as part of the total cherries that have been delivered and processed.

Consequently, grower in-orchard diversions effectively increased the supply of restricted cherries even though none of those cherries were delivered for processing. Grower diversion certificates are considered to be part of the total quantity of cherries that a handler receives and processes, and contribute to the total supply of restricted cherries in the OSF. This creates confusion in accounting for the cherries in years when cherries are restricted for both the growers and processors.

The OSF is the mechanism specified in the order and used by CIAB to determine the relationship between the demand and supply of tart cherries in a given year. When the supply of tart cherries exceeds the average demand, volume regulation is implemented.

In an effort to stabilize supply and prices, the tart cherry industry uses volume regulation, which allows the industry to set free and restricted percentages. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage cherries are placed in a reserve inventory. The primary purpose of setting restricted percentages and placing cherries in a reserve inventory is to attempt to balance supply with demand.

A related component of the OSF under the order involves growers diverting cherries by leaving them unharvested in the orchard. Handlers can coordinate with their growers in large crop years by encouraging them to divert cherries from production. Handlers can then acquire the diversion certificates issued to growers and use them as credit toward their restriction or reserve obligations.

Prior to implementation of these amendments, the interaction of sections 930.10 and 930.50 of the order established that grower in-orchard diversion is subject to the restriction percentage calculated for the year.

Because of this, grower diversion certificates had less value when growers redeemed them with handlers. Therefore, when a handler utilized the grower diversion certificates received from growers, the certificates had a reduced value as a compliance tool in meeting the restricted obligation. Because the certificates have a reduced value, growers delivered most of their crop to handlers instead of diverting cherries in the orchard in large crop years.

The implementation of these amendments will remove the grower disincentive for in-orchard diversion. Because the way grower diversions are accounted for will change, the grower diversion program helps mitigate the negative effects of oversupply by increasing the amount of cherries diverted from production.

This action will have a positive impact on growers. The value of the grower diversion certificates will increase. As the value of the certificates increases, grower diversion of cherries in large crop years will increase. Increased grower diversion activity will help reduce excess supplies, which in turn will have a positive impact on grower returns. In addition, grower costs associated with harvesting and transporting cherries to handlers will be reduced as more cherries are diverted.

This action will also have a positive impact on handlers. As more fruit is diverted in the orchard, handlers will avoid the processing and storage costs that they would otherwise incur if growers harvested and delivered the fruit. Reducing the available supply of cherries will mitigate the price depressing effects that oversupply typically has on the market, resulting in a positive effect for both growers and handlers.

Testimony at the hearing suggested that the amendments, which encourage grower diversions, will not have a negative impact on small growers or handlers. The hearing record suggests that these amendments will benefit small growers by providing better opportunities to divert cherries in the orchard in large crop years. Small handlers are not always able to ship to export markets or have as much new product activity as larger handlers. Small handlers will benefit from these amendments by providing diversion credits as a way to meet their restrictions.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB

No. 0581-0177, (Tart cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin). No changes in those requirements is necessary a result of this action. Should any change become necessary, it would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

The implementation of these requirements will not impose any additional costs on handlers. In fact, these amendments will reduce costs for both growers and handlers.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Civil Justice Reform

The amendments to Marketing Order 930 stated herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order, is not in accordance with the law, and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

**Order Amending the Order Regulating the Handling of Tart
Cherries Grown in Michigan, New York, Pennsylvania, Oregon,
Utah, Washington, and Wisconsin**

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary to the findings and determinations that were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) Findings and Determinations Upon the Basis of
the Hearing Record.

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, (7 USC 601-612), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon proposed further amendment of Marketing Agreement and Order No. 930, regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

1. The marketing agreement and order, as amended, and as hereby further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

2. The marketing agreement and order, as amended, and as hereby further amended, regulate the handling of tart cherries grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

3. The marketing agreement and order, as amended, and as hereby further amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing agreement and order, as amended, and as hereby further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and

marketing of tart cherries grown in the production area;
and

5. All handling of tart cherries grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) Additional Findings.

It is necessary and in the public interest to make these amendments effective not later than one day after publication in the **Federal Register**. A later effective date would unnecessarily delay implementation of the amendments. These amendments should be in place as soon as possible, as the new production year begins on July 1.

In view of the foregoing, it is hereby found and determined that good cause exists for making these amendments effective one day after publication in the **Federal Register**, and that it would be contrary to the public interest to delay the effective date for 30 days after publication in the **Federal Register** (Sec. 553(d), Administrative Procedure Act; 5 U.S.C. 551-559).

(c) Determinations. It is hereby determined that:

1. Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping tart cherries covered by the order as hereby

amended) who, during the period July 1, 2010, through June 30, 2011, handled 50 percent or more of the volume of such cherries covered by said order, as hereby amended, have signed a marketing agreement, and

2. The issuance of this amendatory order, further amending the aforesaid order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of July 1, 2010, through June 30, 2011 (which has been determined to be a representative period), have been engaged within the production area in the production of such cherries, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

3. The issuance of this amendatory order is favored or approved by processors who, during the period of July 1, 2010, through June 30, 2011 (which has been determined to be a representative period), have engaged in canning or freezing cherries for market and have frozen or canned more than 50 percent of the total volume of cherries regulated which were canned or frozen within the production area.

**Order Relative to Handling of Tart cherries Grown in
Michigan, New York, Pennsylvania, Oregon, Utah, Washington,
and Wisconsin**

It is therefore ordered, That on and after the effective date hereof, all handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin shall be in conformity to, and in compliance with the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed marketing order amending the order contained in the Secretary's Decision issued on February 28, 2012 and published in the **Federal Register** on March 5, 2012 (77 FR 13015) shall be and are the terms and provisions of this order amending the order and are set forth in full below.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons stated in the preamble, the Agricultural Marketing Service amends 7 CFR Part 930 as follows:

**Part 930- Tart Cherries Grown in the States of Michigan,
New York, Pennsylvania, Oregon, Utah, Washington, and
Wisconsin**

1. The authority citation for 7 CFR part 930
continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Revise the introductory text in § 930.10 to read
as follows:

§ 930.10 Handle.

Handle means the process to brine, can, concentrate,
freeze, dehydrate, pit, press or puree cherries, or in any
other way convert cherries commercially into a processed
product, or divert cherries pursuant to § 930.59, or to
otherwise place cherries into the current of commerce
within the production area or from the area to points
outside thereof: *Provided*, That the term handle shall not
include:

* * * * *

3. Revise paragraphs (d) and (e) of § 930.50 to read
as follows:

§ 930.50 Marketing policy.

* * * * *

(d) Final percentages. No later than September 15 of
each crop year, the Board shall review the most current

information available including, but not limited to, processed production and grower diversions of cherries during the current crop year. The Board shall make such adjustments as are necessary between free and restricted tonnage to achieve the optimum supply and recommend such final free market tonnage and restricted percentages to the Secretary and announce them in accordance with paragraph (h) of this section. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent shall be the final restricted percentage. With its recommendation, the Board shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors.* When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Board shall give consideration to the following factors:

- (1) The estimated total production of cherries;
- (2) The estimated size of the crop to be handled;
- (3) The expected general quality of such cherry production;
- (4) The expected carryover as of July 1 of canned and frozen cherries and other cherry products;

- (5) The expected demand conditions for cherries in different market segments;
- (6) Supplies of competing commodities;
- (7) An analysis of economic factors having a bearing on the marketing of cherries;
- (8) The estimated tonnage held by handlers in primary or secondary inventory reserves;
- (9) Any estimated release of primary or secondary inventory reserve cherries during the crop year; and
- (10) The quantity of grower-diverted cherries during the crop year.

* * * * *

4. Revise paragraph (a) of §930.58 to read as follows:

§ 930.58 Grower diversion privilege.

(a) In general. Any grower may voluntarily elect to divert, in accordance with the provisions of this section, all or a portion of the cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting grower a grower diversion certificate which such grower may deliver to a handler. Any grower diversions completed in accordance with this

section, but which are undertaken in districts
subsequently exempted by the Board from volume regulation
under § 930.52(d), shall qualify for diversion credit.

* * * * *

Dated: May 31, 2012

David R. Shipman
Administrator
Agricultural Marketing Service

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